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No. _____

IN THE

Supreme Court of The United States

JESUS TORRES-TORRES

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I

WHETHER THERE WAS PREJUDICIAL ERROR IN THE ADMISSION OF A STATEMENT BY A THIRD PARTY RESULTING IN AN ERRONEOUS INSTRUCTION TO THE JURY.

II

WHETHER THERE WAS SUCH PREJUDICE IN THE JURY INSTRUCTIONS THAT PETITIONER IS ENTITLED TO A REVERSAL.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO._____

JESUS TORRES-TORRES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Jesus Torres-Torres, the Petitioner herein, prays, that a Writ of Certiorari issue to review the denial of appeal by the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on July 26, 1982 and the Court's denial of Petitioner's petition for rehearing and suggestion for rehearing en banc on September 20, 1982.

OPINIONS BELOW

The opinions of the Court are printed in Appendix A hereto, infra, pages A-1 through A-24.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied Petitioner's timely appeal on July 26, 1982 (Appendix A, infra, page A-1). A timely petition for rehearing was denied on September 20, 1982. The jurisdiction of the Supreme Court is involved under Title 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

The Fifth Amendment of the Constitution provides in pertinent part:

> "(No person shall) be deprived of Life, Liberty or property, without due process of law . . ."

STATEMENT OF THE CASE

This is an appeal by Jesus Torres-Torres from a conviction of conspiracy to unlawfully distribute heroin, a violation of Title 21, United States Code, Section 846; a conviction of possession with intent to distribute heroin, a violation of

Title 21, United States Code Section 841(a); a conviction of assaulting with deadly weapons special agents of the Drug Enforcement Administration, a violation of Title 18, United States Code Section III; and a conviction of unlawfully carrying a firearm during the offense of possession with intent to distribute heroin, a violation of Title 18, United States Code, Section 924(c)(2).

An indictment was filed on June 19, 1980, with the Clerk of the United States District Court for the Eastern District of California.

On June 23, 1980, appellant was arraigned and entered a plea of not guilty.

On November 12, 1980, jury trial commenced.

On November 25, 1980, the jury returned a guilty verdict on all four counts.

On December 19, 1980, the Court sentenced appellant to twelve years on Counts I and II each to be served concurrently and

to three years on Counts III and IV each, said three years to be consecutive to the twelve years' sentences.

Appellant is currently incarcerated.

On January 19, 1981, petitioner filed a Notice of Appeal to the Ninth Circuit Court of Appeals.

On March 15, 1982, a panel of the Ninth Circuit Court of Appeals reversed petitioner's conviction of Counts I and II and remanded the case for a new trial.

On March 27, 1982, the government filed a Petition for Rehearing and Suggestion for Rehearing en banc.

On May 21, 1982, a panel of the Ninth Circuit Court of Appeals directed petitioner to respond to the issue of whether a certain statement was inadmissible hearsay.

On July 26, 1982, the same three judge panel of the Ninth Circuit reversed its own opinion of March 15, 1982. The court withdrew its March 15, 1982 opinion, affirmed

petitioner's conviction of Counts I, III and IV and reversed petitioner's conviction of Count II.

On August 9, 1982, petitioner filed a Petition for Rehearing and Suggestion for Rehearing en banc.

On September 20, 1982, the Ninth Circuit Court of Appeals denied this petition and rejected the Suggestion for Rehearing en banc.

STATEMENT OF FACTS

On June 11, 1980, Petitioner, along with Rafael Astorga-Torres, was arrested at the Sky Ranch Motel in Tulare County, California.

The three men had driven up on that day from Los Angeles and had been under government surveillance during their entire trip.

Agent Delgado testified that on June 10, 1980, he had entered into an agreement with Mr. Ambriz to purchase fifteen

ounces of heroin.

Agent Delgado further testified that Ambriz said he would be bringing someone to guard him.

Despite objections by the defense, Agent Delgado was allowed to testify as to his previous heroin dealings with Ambriz.

Agent Delgado met with Ambriz in front of Room 7 at the motel where Ambriz showed him a bag containing heroin.

Subsequently, Ambriz was arrested.

A gun battle erupted between government agents and an occupant or occupants in Room 4 where Petitioner and Rafael Astorga-Torres were staying.

Petitioner and Rafael Astorga-Torres came out of Room 4 with Petitioner crawling as a result of his wounds.

Agent Delgado further testified that appellant told him that the appellant had thought that the law enforcement officers were robbers and that Delgado thought

appellant was going to die.

Appellant's room was searched without a warrant.

The car in which appellant had driven from Los Angeles revealed no heroin.

On or about August 8, 1980, Agent Delgado searched the motel septic tank system, in which Room 4 along with three other rooms emptied, and retrieved two torn condoms tied at the top and one untorn condom containing one ounce of heroin.

REASONS FOR GRANTING WRIT

At the conclusion of the trial, the judge instructed the jury, not once, but twice, over the objections of trial counsel, as follows:

> "So, if you find that a defendant now on trial was not in possession of the heroin when it was brought to Tulare County -- I think that I am going to make it. If you find that a defendant now on trial was

not in possession when it was brought to Tulare County, but you find that the defendant was present to guard Ambriz, you may still find the defendant guilty as to the offense charged in Count II of the indictment if you find beyond a reasonable doubt that the defendant, one, acted with a conscious purpose to avoid learning that Ambriz was going to be selling heroin, and, two, was subjectively aware of a high probability that Ambriz was to sell some heroin.

"I am to read this to you again because its -- you've got to deal with this instruction carefully and deliberately. If you find that a defendant now on trial was not in possession of the heroin when it was brought to Tulare County but you find that

the defendant was present to guard Ambriz, you may still find the defendant guilty as to the offense charged in Count II of the indictment if you find beyond a reasonable doubt that, one, the defendant acted with a conscious purpose to avoid learning that Ambriz was going to be selling heroin, and two, was subjectively aware of a high probability that Ambriz was to sell some heroin.

"Thus, actual or positive knowledge is not necessary to convict the accused if he was subjectively aware of a high probability of the crucial fact, namely that Ambriz was to sell some heroin, even though he consciously or deliberately disregarded that probability in an effort to remain ignorant of the fact."

In its opinion dated March 15, 1982, the Ninth Circuit of Appeals panel reversed Appellant's conviction on Counts I, II and IV, affirmed the conviction on Count III and remanded the case to a new trial.

The Ninth Circuit reversed on Count II (possession) on the correct conclusion that the trial court's instruction on possession by using the so-called Jewell Instruction was "....far from harmless...." (Court's opinion, page 8, dated March 15, 1982).

The Ninth Circuit reversed on Count I (conspiracy) again in the correct conclusion that the trial court erred in admitting certain statements and concluded reversible error as follows:

> "As to Ambriz's earlier statements, only his comment that he intended to bring guards with him to Tulare was really prejudicial. That statement could properly be admitted in a preliminary hearing before the

judge to establish that the agents had probable cause to suppose that appellants were parties to the action and subject to arrest. However, upon the issue of guilt of conspiracy the statement was inadmissible as hearsay since it was made prior to the existence of any conspiracy so far as the record has established. The judge acknowledged this state of the record, but nonetheless invited the jury to find that such a conspiracy existed, and instructed that if they did so find they might consider the statement for any purpose. We agree with appellants that this constituted reversible error." (Court's opinion, page 7 dated March 15, 1982).

The government filed a petition for rehearing and argued that the statements of

Ambriz were properly admitted.

On July 26, 1982, the same panel of the Ninth Circuit Court of Appeals reversed itself and, while acknowledging error was "harmless" and held as follows:

> "As to Ambriz's earlier statements, only his comment that he intended to bring guards with him to Tulare was really prejudicial. That statement was properly admitted as evidence of Ambriz's intent under Rule 803, Fed.R.Evid. Rule 803 follows the holding in Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 295-96 (1891), to the effect that a statement of the declarant's intent to do something is competent "not as (a) narrative() of facts communicated to the (declarant) by others, nor yet as proof that he actually (did as he intended,) but as evidence that * * * he had

the intention of (so doing)." Evidence of that intent can then be considered by the jury in determining whether the declarant subsequently performed the intended act. To the same effect, United States v. Pheaster, 544 F.2d 353, 374-80 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977) (applying Hillmon before Federal Rule of Evidence were in effect); United States v. Jenkins, 579 F.2d 840, 842-44 (4th Cir.) cert. denied, 439 U.S. 967 (1978). Here an appropriate limiting instruction was given. Accordingly we conclude that Ambriz's statement was properly admitted not as proof in fact he did bring guards with him to Tulare (or that appellants were those guards) but as evidence that he had the intent to do so, from

which evidence inferences could properly be drawn by the jury. For this purpose the statement was admissible and relevant as to the other defendants. See United States v. Pheaster, supra. With respect to the same statement of Ambriz, the judge further instructed the jury that if they found that a conspiracy existed between Ambriz and Appellant Astorga-Torres at the time the statement was made, then as to that appellant they could consider the statement "for all purposes" as the declaration of a co-conspirator. Arguing that the record is devoid of any evidence from which it could be concluded that a conspiracy existed at that time, Appellant Astorga-Torres assigns the giving of this instruction as error. We accept, arguendo,

this contention of error but hold it to have been harmless. The line between use of a statement as proof that the intended act was in fact ultimately performed (improper use) and its use as basis for an inference to that end (proper use) is at best tenuous. Cf. Nash v. United States, 54F.2d 1006, 1007 (2nd Cir. 1932) (such limiting instructions demand of jury "mental gymnastic(s)"). If indeed the jury understood the instructions as an invitation to take the short step from permissible inferences to impermissible deduction, its limited impact was overshadowed by the abundant evidence that appellant was engaged in some sort of joint enterprise with Ambriz - evidence from which it could be inferred that appellant's function in that

> enterprise was such as to call for him to be armed and ready to use armed force to protect against instrusion into the affairs of the enterprise. In our view the more probable effect of the instruction, however, was to call the attention of the jury to the fact that Ambriz's statement was not entitled to conclusive weight as proof of anything. Under these circumstances, we conclude that any error in the instruction was harmless."

The Ninth Circuit therefore concluded that the United States Supreme Court in its decision of Mutual Life Insurance Co. v. Hillmon, (1891) 145 U.S. 285, 295-96 permitted such jury instructions and evidence to come in.

Appellant argued that this is simply an incorrect reading and application of the Hillmon Doctrine.

It has already been demonstrated that the jury was invited to convict appellant of possession of heroin based on the jury finding that appellant knew or should have known what a third party (Ambriz) was doing. The Ninth Circuit has already reversed that conviction.

Now the issue is whether it was proper to invite the jury to convict appellant of conspiracy based on a statement made by Ambriz that he intended to bring unnamed guards with him and further inviting the jury to find that petitioner was one of the guards.

As pointed above, the Ninth Circuit was compelled to acknowledge that the record shows no evidence that a conspiracy existed at the time the statement was made. (Ninth Circuit Court of Appeals Opinion dated March 15, 1982, page 7, lines 9-17).

In its second opinion, the Ninth Circuit concluded that the statement was

properly admitted to show Ambriz's intent but not as proof that Ambriz brought guards (Ninth Circuit Court of Appeals Opinion dated July 26, 1982, page 7, lines 23-27).

Yet it was precisely to show that Ambriz brought guards with him and precisely to show that petitioner was one of the guards that the jury was invited to find based on the trial judge's instructions:

> "The statements may, however, be used by you to assess the conduct of Ambriz after he made the statements and may be considered by you to determine if he carried out his expressed intention to bring guards with him to Tulare on June 11, and did in fact have guards with him on that day in the persons of defendants here on trial.

The jury was told it could use the statements to find that he brought guards with him in the persons of appellants.

This is contrary to both Mutual Life Insurance Co. v. Hillmon, supra, and United States v. Pheaster, supra.

As earlier pointed out, the editorial comments contained in the United States Code Services Annotations regarding Section 803(3) pointed out:

> "However, the House Committee intends that the Rule can be construed to limit the doctrine of Mutual Life Insurance Co. v. Hillmon (1891) 145 U.S. 285, 36 Lawyer's Edition 706, 12th Supreme Court 909, so as to render statements of intent by a declarant admissible only to prove his future conduct, not the conduct of another person."

In the instant case, the trial judge instructed the jury not only as to the future conduct of Ambriz, but also as to the future conduct of appellant.

It is finally submitted that there

was extreme prejudice to appellant in the giving of the so-called Jewell instruction and that that instruction not only prevented appellant from receiving a fair trial on Count II (possession), but also on Count I (conspiracy).

There is, of course, no way of determining which Count the jury decided first or whether the jury did, in fact, use the Jewell instruction in connection with Count I as well as Count II. It would appear, however, that a jury could well find them inseparable.

What is certain is that both the government and the trial court felt that the Jewell instruction applied to both counts:

> "On page 1414 of the reporter's transcript (Volume 8) even Mr. Leighton concedes that the Jewell instruction applies to the conspiracy count. . . "because if the

defendants got together with Ambriz and talked about them guarding him, then the -- they cannot claim lack of knowledge of what they were to guard Ambriz for to negate the fact that they were co-conspirators if there was a high probability that they were subjectively aware of the high probability that when they met with Ambriz and decided what they were to do that they were going to be guarding Ambriz for the purpose of him consummating a heroin transaction. . ." and on page 1415 (Volume 8) the court agreed with Leighton and said: "I can't -- I really don't see the difference between the aiding and abetting count and the conspiracy count as it may be affected by this instruction. I think the two will go hand in hand, if the facts go

hand in hand. . . so what's the difference? If they are both the same. And I don't think that you can limit it just to count two. If you're going to use -- I think it applies to count one as much as it does to count two.""

The law in this area is very clear regarding both constitutional errors and non-constitutional errors.

FIRST it is well settled that errors involving an instruction which state an unconstitutional presumption are "harmful per se". See Vacaro v. United States, 461 F.2d 626 at 635 (5th Cir. 1972). "When a jury is instructed in an unconstitutional presumption, the conviction must be overturned, though there was no ample evidence apart from the presumption to sustain the verdict." Chapman v. California, 386 U.S. 18 at 44, 87 S. Ct. 824 at 838, 17 L.Ed.2d 705 at 721-22; Vacarro v. United States,

supra, at 635.

SECONDLY in Kottemkos v. United States, 328 U.S. 750, the United States Supreme Court held that a trial court's non-constitutional error will be considered harmless only when the court is sure that the error did not influence the jury or "had but very slight effect. . ." (emphasis added) at 66 S.Ct 1248. The court stated:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself

had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

supra at 66 S.Ct. 1248

The Ninth Circuit, in its opinion of July 26, 1982, suggested that any error was cured by the "abundant evidence that appellant was engaged in some sort of joint enterprise". (Court's Opinion, page 8, dated July 26, 1982)

The United States Supreme Court has held that the fact that the appellate Court believed the appellant guilty is not enough to casually dismiss an error as harmless. See Kottemkos v. United States, (1946) 328 U.S. 750, 763.

One inevitably returns to this court's opinion in Chapman v. California, supra, and the constitutional questions whether the error or errors were harmless beyond a reasonable doubt.

It is submitted that the answer must

be no and Petitioner is entitled to a new trial free of constitutional error.

CONCLUSION

For all the foreclosing reasons it is submitted that Petitioner is entitled to a reversal on Counts I, II and IV.

Respectfully submitted,

CARL M. STEIN

CERTIFICATE OF SERVICE

I, Deborah A. Appel, a resident of the County of Sacramento, State of California and over the age of eighteen (18) years, hereby certify that on this 18th day of November, 1982, I served three (3) copies of the foregoing "Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit" by placing said copies in the U.S. Mail, upon the Solicitor General, Rex E. Lee, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530.

Deborah A. Appel

I, Deborah A. Appel, do hereby say as follows:

1. That on November 18, 1982, I deposited in a United States Post Office with first class postage prepaid, and properly addressed to the United States Supreme Court, I mailed this Petition for Writ of Certiorari. Said mailing was done at the Federal Post Offices, 2000 Royal Oaks Drive, Sacramento, California.

Dated: November 18, 1982.

Deborah A. Appel

Sworn to and subscribed before me on the above written date.

Betty S. Nakayama

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. RAFAEL ASTORGA-TORRES, Defendant-Appellant.	C.A. NO. 81-1063
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JESUS TORRES-TORRES, Defendant-Appellant.	C.A. NO. 81-1064 USDC NO. CR 80-104 O R D E R

Appeal from the United States
District Court Eastern
District of California
Hon. Thomas J. MacBride, Presiding

Before: MERRILL and KENNEDY, Circuit Judges, and KING,* Chief District Judge

After consideration of the Petition for Rehearing herein and the response thereto, it is ordered that the Opinion

*Honorable Samuel P. King, Chief United States District Judge, District of Hawaii, sitting by designation.

heretofore filed on March 15, 1982 is hereby withdrawn and is superseded by the Opinion filed contemporaneously with this Order. Save in the respects in which the superseding Opinion modifies the original, rehearing is denied.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. RAFAEL ASTORGA-TORRES, Defendant-Appellant.	C.A. NO. 81-1063
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JESUS TORRES-TORRES, Defendant-Appellant.	C.A. NO. 81-1064 USDC NO. CR 80-104 O P I N I O N

Appeal from the United States
District Court Eastern
District of California
Hon. Thomas J. MacBride, Presiding

Argued and Submitted: November 9, 1981

Before: MERRILL and KENNEDY, Circuit Judges, and KING,* Chief District Judge

MERRILL, Circuit Judge

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* Honorable Samuel P. King, Chief United States District Judge, District of Hawaii, sitting by designation.

Appellants have been convicted of conspiracy to distribute heroin, Count I; possession with intent to distribute heroin, Count II; assault with deadly weapons upon special agents of the Drug Enforcement Agency (DEA), Count III; and, carrying of a firearm during commission of a federal narcotics felony, Count IV. On this appeal, they assign error in many respects.

The incidents giving rise to the criminal charges occurred on June 11, 1980 at a motel near Tulare, California. The motel was the rendezvous established by DEA agents and appellants' co-defendant, Jose Ambriz-Ambriz, for a narcotics sale by Ambriz. While under surveillance of DEA agents, Ambriz and appellants in two cars had traveled to Tulare from the Los Angeles area. At the motel, Ambriz was assigned cabin 7 and appellants cabin 4. The arrangements with Ambriz had been for the sale of fifteen ounces of heroin on

June 11 and fifteen ounces on June 12. The price was to have been $3,300 per ounce. Outside cabin 7, Ambriz produced a brown paper bag for inspection by Agent Delgado. Delgado satisfied himself that the bag contained heroin and then gave a signal on which Ambriz was placed under arrest by other agents. The bag contained only seven ounces of heroin, each ounce packaged in a condom bearing the date 12/79 and stamped "Trojan." Later investigation revealed no additional heroin in cabin 7, but a scrap of paper was found there with calculations: 8 X 3300 totaling 26, 400; 7 X 3300 totaling 23,100. The two products were summed for a total of 49,500 - the agreed dollar price for the fifteen ounces of heroin.

After Ambriz had been arrested, the agents knocked at the door of cabin 4, identified themselves, and demanded entrance. There was no response. This had continued for about a minute when an agent at the

front door heard a clicking sound which he took to be the cocking of a firearm. The door was then kicked in and the agents found themselves confronted by one of the appellants with a revolver. He fired at the agents who responded with a shotgun wounding the appellant. This initiated a sporadic exchange of gunfire through the door and bathroom window. Finally a tear gas cannister was fired into the room and appellants surrendered; threw out their guns; and, came out with hands up.

Agent Plavan entered the cabin, satisfied himself that no one else was in it and observed the extensive damage done by the shootout. In the bathroom, the basin faucet was running at full power and the toilet bowl was filled with debris including a wallet and papers. Agent Plavan removed the debris and placed it on top of the toilet tank to dry. There was no sign of the paper bag. The cabin was sealed and

placed in control of local officers. Later that night a DEA agent returned and retrieved the material that had been found in the toilet bowl.

The motel cabins were connected to four septic tanks, with cabins 4 and 7 connected to different tanks. On August 8, 1980, agents had the septic tank serving cabin 4 and three other cabins opened and pumped out. Approximately twelve condoms were recovered. One was tied at the end and appeared to be full of substance. Two were tied at the end but were torn below the knot and were empty. All three were stamped "Trojan." The two torn condoms bore the date 12/79. The date on the full condom was illegible. These three condoms were received in evidence at the trial. The others were discarded.

Ambriz pleaded guilty to five counts of the indictment, including Counts I and II. Appellants pleaded not guilty and

were tried before a jury.

At the trial, a government expert testified to chemical analysis of the contents of the full condom and of the documents recovered from the toilet bowl. He testified that the condom contained heroin and that the documents gave evidence of having been in contact with heroin.

Agent Delgado testified as to two prior drug transactions with Ambriz: purchases of one ounce on May 3, 1980 in Fresno, and of two ounces on May 4, 1980 in Tulare County. On each occasion, the heroin had been packaged in Trojan condoms. On the latter occasion, Ambriz had been observed by another agent to have met with one of the appellants before leaving the Los Angeles area for Tulare. Agent Delgado testified that in making arrangements for the June 11th sale, Ambriz had stated that he was going to bring someone to guard him.

The government's theory was that appel-

lants were knowing parties to a conspiracy to sell heroin and had been in actual possession of the balance of the fifteen ounces that was the subject of the June 11 sale and had flushed it down the basin and the toilet during the course of the gun fight.

Appellants' defense was that they knew nothing of the narcotics sale and never had knowing possession of any narcotics.

Motion to Suppress

Appellants sought to suppress the documents recovered from the toilet bowl on the ground that they were the product of an unlawful warrantless search. They assign as error the court's denial of their motion. We find no error. Since the documents were in plain view once Agent Plavan had entered the cabin the only question is whether his entry into the cabin was proper under the circumstances. We hold that it was.

We note first that the agents had probable cause to suppose that appellants

were parties to Ambriz's proposed sale; were in possession of the missing eight ounces of heroin; and were subject to arrest. They had traveled to Tulare in close company with Ambriz and had been observed to be in contact with him at the motel. They had been observed in possession of a paper bag similar to the one in Ambriz's possession containing seven ounces of heroin. Ambriz had stated that he intended to bring guards. Clearly these "facts and circumstances. . .were sufficient to warrant a prudent man in believing that the petitioner(s) had committed or (were) committing an offense." Beck v. Ohio, 379 U.S. 89,91 (1964). It was then proper for the agents to demand entry into appellants' cabin after identifying themselves in order to place appellants under arrest.

Further it was proper for Agent Plavan to enter the cabin following the shootout.

While the presence of anyone else in the cabin was most unlikely, cf. United States v. Gardner, 627 F.2d 906, 911 (9th Cir. 1980) (protective search of premises permissible when officers reasonably believe additional dangerous persons may be present), officers who have been subjected to pistol fire from the front door and bathroom window can hardly be said to be acting unreasonably when they take steps to make sure of their safety. "Courts must be careful not to use hindsight in limiting the ability of police officers to protect themselves as they carry out missions which routinely incorporate danger." United States v. Coates, 495 F.2d 160, 165 (D.C. Cir. 1974). Agent Plavan's entry into the cabin was also reasonable to guard against any threat of fire created by the tear gas cannister and to preserve any evidence from possible destruction. Cf. Michigan v. Tyler, 436 U.S. 499, 510 (1978) (fire official's

prompt inspection of burned building justified to discover continuing dangers and to preserve evidence from destruction.) This is especially true here where the agents had reason to believe appellants were in possession of heroin -- a substance particularly susceptible to destruction. (As an example had the material in the toilet bowl not been removed, any indication that the bowl had once contained heroin might well have been lost.) Further it would seem the act of responsible peace officers to take note of the extent of property damage resulting from a shootout which they and their agency might well be called on to justify.

Once lawfully inside the cabin, it was proper for the agent to seize any evidence which he observed in plain view. Coolidge v. New Hampshire, 403 U.S. 443, 465-66 (1971).

Appellants also contend that regardless

of the validity of the initial cabin check, it was improper for the agents without warrant to return to the cabin to retrieve the documents laid out to dry. We disagree. In retrieving what had already, in effect, been properly seized there was no further prejudicial intrusion upon appellants' privacy, especially in light of their clear abandonment of the seized items. We conclude that it was not error to deny suppression of the material found in the toilet bowl.

Appellants also sought to suppress the condoms found in the septic tank on the ground that any connection this evidence had to them was so tenuous as to render the evidence irrelevant. We disagree. The likelihood that anyone else may have found it necessary during the relevant time span to flush down the toilet condoms containing or apparently having contained contraband is, in our view, sufficiently remote t·

render the evidence relevant. Its weight as proof was for the jury to determine.

Prior Acts and Declarations of Ambriz

Appellants contend that testimony concerning drug sales and statements made by Ambriz prior to the existence of any conspiracy between him and appellants was inadmissible hearsay. As to the earlier drug sales, we note that Ambriz by his nonverbal conduct in consummating the transactions clearly did not intend an assertion. Accordingly evidence of the prior sales was not hearsay and there is no need to bring it within a hearsay exception. See Rule 801, Fed.R.Evid. The evidence was relevant as an indication of Ambriz's modus operandi.

As to Ambriz's earlier statements, only his comment that he intended to bring guards with him to Tulare was really prejudicial. That statement was properly admitted as evidence of Ambriz's intent under Rule 803, Fed.R.Evid.[1/] Rule 803 follows

the holding in Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 295-96 (1891), to the effect that a statement of the declarant's intent to do something is competent "not as (a) narrative() of facts communicated to the (declarant) by others, nor yet as proof that he actually (did as he intended,) but as evidence that * * * he had the intention of (so doing)." Evidence of that intent can then be considered by the jury in determining whether the declarant subsequently performed the intended act. To the same effect, United States v. Pheaster, 544 F.2d 353, 374-80 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977) (applying Hillmon before Federal Rules of Evidence were in effect); United States v. Jenkins, 579 F.2d 840, 842-44 (4th Cir.), cert. denied, 439 U.S. 967 (1978). Here an appropriate limiting instruction was given.[2/] Accordingly we conclude that Ambriz's statement was properly admitted not as proof that in fact he

did bring guards with him to Tulare (or that appellants were those guards) but as evidence that he had the intent to do so, from which evidence inferences could properly be drawn by the jury. For this purpose the statement was admissible and relevant as to the other defendants. See United States v. Pheaster, supra.

With respect to the same statement of Ambriz, the judge further instructed the jury that if they found that a conspiracy existed between Ambriz and Appellant Astorga-Torres at the time the statement was made, then as to that appellant they could consider the statement "for all purposes" as the declaration of a co-conspirator.[3/] Arguing that the record is devoid of any evidence from which it could be concluded that a conspiracy existed at that time, Appellant Astorga-Torres assigns the giving of this instruction as error. We accept, arguendo, this contention of error but hold

it to have been harmless. The line between use of a statement as proof that the intended act was in fact ultimately performed (improper use) and its use as basis for an inference to that end (proper use) is at best tenuous. Cf. Nash v. United States, 54 F.2d 1006, 1007 (2nd Cir. 1932)(such limiting instructions demand of jury "mental gymnastic(s)"). If indeed the jury understood the instruction as an invitation to take the short step from permissible inference to impermissible deduction, its limited impact was overshadowed by the abundant evidence that appellant was engaged in some sort of joint enterprise with Ambriz - evidence from which it could be inferred that appellant's function in that enterprise was such as to call for him to be armed and ready to use armed force to protect against intrusion into the affairs of the enterprise. In our view the more probable effect of the instruction, how-

ever, was to call the attention of the jury to the fact that Ambriz's statement was not entitled to conclusive weight as proof of anything. Under these circumstances, we conclude that any error in the instuction was harmless.

Jewell Instruction

Count II charged appellants with possession of heroin with intent to distribute it in violation of 21 U.S.C. Section 841(a)(1). As we have noted, the Government's theory was that appellants were in actual possession of the eight ounces of heroin that was not found to be in Ambriz's possession. The Government did not contend that they also had such a degree of control over the heroin in Ambriz's possession as to be in constructive possession of that heroin as well.

The district court twice instructed the jury as follows:

If you find that a defendant now

> on trial was not in possession of the heroin when it was brought to Tulare County but you find that the defendant was present to guard Ambriz-Ambriz, you may still find the defendant guilty as to the offense charged in Count II of the indictment if you find beyond a reasonable doubt that, one, the defendant acted with a conscious purpose to avoid learning that Ambriz-Ambriz was going to be selling heroin, and two, was subjectively aware of a high probability that Ambriz-Ambriz was to sell some heroin.

This instruction was drawn from United States v. Jewell, 532 F.2d 697 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976), where it dealt with establishing not the fact of possession but the fact of knowledge under circumstances where it was contended that the

defendant had deliberately closed his eyes to the apparent facts. We have held that the Jewell instruction is appropriate only in such circumstances. United States v. Erwin, 625 F.2d 838, 841 (9th Cir. 1980). As given here, the instruction invited the jury, if unable to conclude that appellants had been in actual possession of the eight ounces of heroin, to find that they were in constructive possession of the seven ounces possessed by Ambriz. To find such constructive possession, the instruction required the jury to find only that appellants knew, or should have known, that Ambriz had heroin he planned to sell. Yet we have held that "(m)ere proximity to the drug, mere presence, or mere association with the person who does control the drug is insufficient to support a finding of possession." United States v. Batimana, 623 F.2d 1366, 1369 (9th Cir.), cert. denied, 499 U.S. 1038 (1980). Because the

Government's case as to the actual possession was not without its elements of doubt, the court's error in instructing the jury as to constructive possession was far from harmless.

Miscellaneous Matters

We find no merit in appellants' contention that they were prejudiced by the Government's destruction of the approximately nine condoms found in the septic tank which were not retained as evidence. The requisite prejudice does not appear. See United States v. Heiden, 508 F.2d 898, 902 (9th Cir. 1974).

We find no merit in the contention of one appellant that he did not receive adequate assistance of counsel.

Conclusion

Judgment on Counts I, III and IV is AFFIRMED. Judgment on Count II is REVERSED.

FOOTNOTES

1/ Rule 803 provides:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

"(3) * * * A statement of the declarant's then existing state of mind * * * (such as intent, plan * * *) * * *."

2/ The court instructed:

"These statements (that Ambriz intended to bring persons to guard him and that he intended to sell fifteen ounces of heroin to Delgado on June 11th) were admitted only to show the state of mind or intention of Ambriz at the time he made the statements. The statements * * * are not to be considered by you as evidence that, at the time they were made, these defendants or

either of them, by that I mean Rafael and Jesus, were, in fact, his guards or that he had a specific intention to recruit either or both of them as his guards at the time that statement was made, nor were the statements admitted to prove that, at the time they were made, these defendants or either of them, were in a conspiratorial relationship with Ambriz for the unlawful distribution of heroin.

"The statements may, however, be used by you to assess the conduct of Ambriz after he made the statements and may be considered by you to determine if he carried out his expressed intention to bring guards with him to Tulare on June 11th and did, in fact, have guards with him on that day in the persons of the defendant here on trial.

"The statements may also be used and considered by you to determine if Ambriz carried out his expressed intention to bring, or caused to be brought, to Tulare the fifteen ounces of heroin mention in his conversation with Delgado on June 10th."

3/ The court instructed:

"If you persuaded to the required degree of proof that Rafael and Ambriz * * * were in the beginning stages of or were already in a conspiratorial relationship for the sale and distribution of heroin at the time the June 10th statements were made, then you may consider those statements for all purposes in determining the guilt or innocence of Rafael as to those counts of the Indictment to which you believe the evidence of those statements would be relevant."

JESUS TORRES-TORRES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ASSOCIATION OF ATTORNEY AND ENTRY OF APPEARANCE

CARL M. STEIN, a member of the Bar of the State of California and the United States Supreme Court hereby acknowledges his association with the Law Offices of Jennings & Jenks, for the purpose of filing, briefing and arguing this Writ of Certiorari and subsequent matters and does make this document an entry of appearance for all purposes.

CARL M. STEIN

I hereby consent to the herein association and entry.

JENNINGS & JENKS

By: MARTIN F. JENNINGS, JR.